BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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In the Matter of	)	
Telecommunications Services Inside Wiring	)	CS Docket No. 95-184
Customer Premises Equipment	)	
In the Matter of	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-260
Cable Home Wiring	)	

REPLY COMMENTS OF TIME WARNER CABLE

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SUMMARY

Time Warner continues to urge the Commission to adopt policies designed to entrust MDU residents with the ability to make their own MVPD choices, rather than allowing MDU owners to select a single MVPD to serve all the residents of a particular building.

The Commission does not have jurisdiction under the home wiring provision to abrogate existing MVPD service contracts, nor does the Commission have authority to interfere with provisions of existing private MVPD service contracts, including contracts that provide for the exclusive use of hallway molding or conduit. The Commission also lacks authority to apply a "fresh look" approach in the MDU video service context. Moreover, contracts that run for the term of a franchise and any renewals thereof are not perpetual because they have a defined term: when the franchise expires. Any renewals of the franchise, and corresponding renewals of the exclusive contract, are not automatic, but rather, must be renegotiated at the end of the franchise term.

The Commission must be careful to assure that any regulations that purport to apply to MVPD service contracts do not apply in states with mandatory access to premises statutes. States with mandatory access statutes offer MDU residents an amount of control over their choice of MVPD service that they would not have in the absence of such a statute. Access statutes are enacted to assure that residents of MDUs will have access to franchised multichannel video programming service, and to encourage multi-wire competition in the MDU. The Commission has already recognized the prevalence of two-wire competition in states with access statutes, and it should be encouraging other states to enact such provisions, rather than considering preemption of existing access statutes.

Any rules that the Commission adopts that affect MVPDs' ability to enter into exclusive contracts must apply equally to all MVPDs. There simply is no justification for treating one MVPD differently from another. Specifically, the Commission should not attempt to differentiate among MVPDs based on a "market power" test. Also, the Commission should not adopt any "cap" on the length of exclusive service contracts because there is no competitive benefit to the adoption of such a "cap," and it is not the Commission's role to guarantee the economic success of a particular MVPD by insulating it from competition long enough for it to recover its capital costs.

The Commission's signal leakage rules, including all reporting requirements, should apply to all broadband service providers that use frequencies in the aeronautical and public safety bands. A small operator exemption should not be created because it would not serve the public interest of assuring the integrity of the aeronautical and public safety frequencies.

The Commission and many commenters agree that shared use of broadband wiring by multiple MVPDs is not yet technically, practically or economically feasible. The Commission should leave the question whether competitors should share home run wiring to the marketplace. Forced shared use of wiring would create common carrier obligations, and raise Fifth Amendment taking concerns that the Commission has wisely avoided thus far.

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REPLY COMMENTS OF TIME WARNER CABLE

Time Warner Cable ("Time Warner"), a division of Time Warner Entertainment Company, L.P., by its attorneys, hereby respectfully submits these reply comments in response to comments filed on December 23, 1997 in the above captioned Second Further Notice of Proposed Rulemaking, released by the Federal Communications Commission ("Commission" or "FCC") on October 17, 1997.[1] Time Warner, through various subsidiaries and affiliates, operates cable television systems across the nation.

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[1]Telecommunications Service Inside Wiring, Customer Premises Equipment, Report and Order and Second Further Notice of Proposed Rulemaking, CS Docket No. 94-184, FCC 97-376 (rel. October 17, 1997) ("Second Further Notice").

I. Regulation Of Exclusive Service Contracts Is Beyond The Scope Of The Commission's Authority, And Is Not Necessary To Promote Competition In The MVPD Marketplace.

Throughout this proceeding, Time Warner has urged the Commission to pursue policies designed to enhance the ability of multiple dwelling unit ("MDU") building residents to choose among competing multichannel video programming distributors ("MVPDs"), rather than to simply enhance the bottleneck power of MDU owners to select a single MVPD to serve a particular building. Indeed, similar pro-consumer goals have been espoused by Media Access Project/Consumer Federation of America and others, and Time Warner has filed a petition for reconsideration in this proceeding containing numerous specific proposals designed to empower MDU residents with greater choice among competing MVPDs.

To date, the Commission has declined to entrust MDU residents to make their own MVPD selections, but rather has adopted a *parens patriae* approach whereby the Commission "presumes" that the MDU owner will choose the MVPD provider that will be in the best interests of the MDU residents, and that at least a portion of the consideration that the MDU owner negotiates in return for exclusive access will "trickle down" to the MDU resident in the form of improved MVPD service, lower rent, or other amenities. Time Warner continues to believe that such an approach is naive in the extreme, and the record in this proceeding flatly contradicts the Commission's assumption that greater landlord leverage in dealings with MVPDs will somehow enhance consumer welfare. Nevertheless, if the Commission's premise is to have any credence, then the marketplace must be given an unfettered hand, and MDU owners must be allowed to freely contract with all MVPDs. If an MDU owner can negotiate a better deal for the residents of that MDU by entering into an

exclusive contract, then the Commission must not disturb the results of such arms' length negotiations. No one could seriously suggest that MDU owners face a shortage of bidders to offer MVPD service to their residents, and MDU owners readily admit that the ability to offer exclusive contracts has helped create this highly competitive environment.[2] The Commission, therefore, should rely on the existing competitive marketplace, rather than attempt to regulate agreements between private parties.[3]

A. The Commission lacks jurisdiction to abrogate existing exclusive service contracts.

As Time Warner and other commenters have argued repeatedly, the Commission does not have jurisdiction to abrogate existing MVPD service contracts.[4] The home wiring provision, Section 624(i) of the Communications Act, grants the Commission only narrow authority to enact regulations pertaining to the "the disposition after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of

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[2]See, e.g., Community Associations Institute ("CAI") Comments at 3 ("The option of an exclusive contract is an important aspect of the free market as well as an established right of property ownership. . . [C]ertain exclusive agreements ensure the availability of telecommunications services and advance the development of competition"); Building Owners and Managers Association International, *et al.* ("BOMA") Comments at 2 (exclusive contracts are often the only economically viable means of delivering video services to consumers); CAI Comments at 3 ("community associations and their residents are occasionally unable to attract certain telecommunications providers at all or secure favorable rates for residents without the option of entering into exclusive agreements"). All citations to "Comments" herein shall be to the Comments filed in this proceeding on December 23, 1997, unless otherwise indicated.

[3]See GTE Service Corporation ("GTE") Comments at 7 (1996 Act urges the Commission to favor market forces over regulation); U S West Comments at 6.

[4]See, e.g., GTE Comments at 4-10; National Cable Television Association ("NCTA") Comments at 2-4; BOMA Comments at 5-6; Time Warner Comments at 3-6.

such subscriber."[5] Congress never intended for this provision to be stretched so far as to permit the promulgation of rules that undermine existing MVPD service contracts. Moreover, the Commission does not have statutory authority over building owners, who are parties to the exclusive service contracts, or over buildings.[6] Rather, the Commission's authority is limited to providers of regulated communications services.[7] The Commission also lacks jurisdiction over contractual rights involving private property, and may only abrogate existing contractual rights where Congress has specifically authorized such action by statute.[8] Congress has not authorized the Commission to interfere with provisions of existing private MVPD service contracts.[9]

RCN Telecom Services, Inc. ("RCN") has proposed that the Commission not only prohibit exclusive contracts, but prohibit *de facto* exclusive agreements as well.[10] RCN describes *de facto* exclusive agreements as those in which the "incumbent service provider contracts for the exclusive use of the molding or conduit housing its inside wire."[11] RCN

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[5]47 U.S.C. § 544(i).

[6]BOMA Comments at 5-6.

[7]See BOMA Comments at 6 (citing GTE Service Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973)); GTE Comments at 5.

[8]See NCTA Comments at 2-4; BOMA Comments at 6; GTE Comments at 4; Time Warner Comments at 5-6; but see Bell Atlantic Comments at 5-8 (arguing that the Commission has authority to prohibit future, and cancel existing, exclusive contracts under broad, general provisions of Title VI of the Communications Act).

[9]See Bell Tel. Co. of Pa. v. FCC, 503 F.2d 1250, 1280 (3d Cir. 1974).

[10]RCN Comments at 10.

[11]Id.

claims that, while such *de facto* agreements, on their face, give the incumbent service provider exclusive control over only the hallway moldings or conduits in an MDU building, in practice, these contracts operate just like explicit building-wide exclusive agreements because they preclude access by competitors to the "bottleneck" spaces of a building (*i.e.*, the hallways and conduits), thereby precluding installation of competing facilities.[12]

The Commission previously addressed this issue when it adopted a rule permitting an alternative MVPD to install its wiring within an incumbent's existing molding, even over the incumbent's objection, where the MDU owner agrees that there is adequate space in the molding and the MDU owner gives its affirmative consent.[13] In considering whether to adopt that rule, the Commission expressly stated:

> we will not apply this rule where the incumbent has an exclusive contractual right to occupy the molding. Since we do not believe that the incumbent ordinarily will have a property interest in the vacant air space inside the hallway molding, we will not require the alternative MVPD to compensate the incumbent for the placement of its wires.[14]

The Commission's determination that the incumbent provider has no property interest in the vacant air space inside the molding and, therefore, will not be compensated for sharing that molding necessarily means that the only way the incumbent provider can be compensated for installation of the molding is to bargain for an exclusive right to occupy that molding.

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[12]Id.

[13]Telecommunications Service Inside Wiring, Customer Premises Equipment, Report and Order, CS Docket No. 94-184, FCC 97-376, ¶ 109 (rel. October 17, 1997) ("Report and Order").

[14]Id. at ¶ 111.

Interference by the Commission with that bargained for exclusive right is simply beyond the Commission's authority, and should not be countenanced.

The Commission further determined that, where the MDU owner does not agree that there is adequate space in the molding for additional wiring and the MDU owner is willing to permit the installation of larger molding, the existing molding may be replaced with larger molding at the alternative MVPD's expense.[15] However, this rule does not apply "if the incumbent has contracted for the right to maintain its molding on the MDU owner's property without alteration by the MDU owner."[16] Again, the Commission recognized the exclusive contractual rights of the incumbent provider, and wisely decided not to interfere with those rights. Thus, any question regarding whether exclusive contracts for the use of molding should be prohibited has already been resolved, and should not be revisited here. Interference with such contracts, that were fairly and carefully negotiated by the contracting parties, should be left outside the scope of the Commission's regulations.[17]

The Commission also should not adopt a "fresh look" approach for life-of-the-franchise contracts, or any other existing exclusive contracts. In addition to the fact, as explained by Time Warner in its initial comments, that the Commission does not have

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[15]Id. at ¶ 112.

[16]Id.

[17]RCN's contention that MDU owners are often unaware of the implications of molding and conduit exclusivity provisions at the time the agreement is signed is belied by the fact that several commenters during the course of this proceeding have stated that MDU owners and MVPD service providers are equally able to conduct contract negotiations that result in provisions that are beneficial to both parties. See Time Warner Comments at 6-7; Jones Comments, filed September 25, 1997, at 16-17; BOMA Comments, filed September 25, 1997, at 7; Time Warner Reply Comments, filed October 6, 1997, at 13-14.

authority to apply a "fresh look" approach in the MDU video service context,[18] a "fresh look" for exclusive contracts would, *inter alia*, spawn litigation over whether the "fresh look" window has been triggered or expired, and limit the scope of competition to existing service providers by locking out any new entrants that were not yet operational when the "fresh look" window expired.[19] Moreover, as U S West noted, no party has alleged that so-called "perpetual" service contracts are keeping them from serving MDUs.[20] In such a situation, where no actual need has been demonstrated for regulatory action, the Commission should not unnecessarily disturb private contractual relations.[21]

OpTel argues that contracts that run for the term of a franchise and any renewals thereof are perpetual in effect "because they terminate only upon an event that is unlikely to occur (*e.g.*, for the term of a cable franchise plus any renewals thereof)," and "franchise

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[18]RCN argues that the Commission should adopt a "fresh look" approach in this context, just as it did in the common carrier arena. RCN Comments at 15-16. However, the Commission relied on its broad Title II authority in applying "fresh look" in the common carrier arena. The Commission does not have such authority in the area of multichannel video programming. See Time Warner Comments at 8-9.

[19]See Ameritech Comments at 8; accord Bell Atlantic Comments at 4-5 (landlords and tenants would be powerless, during the remaining exclusive contract term, to permit competitive entry by other service providers); BOMA Comments at 7 (while a "fresh look" option may benefit MDU owners and residents, it should not be adopted because the market should be allowed to take its course); U S West Comments at 6 ("fresh look" is not appropriate for existing MDU service contracts under any circumstances; there is no demonstrated need for such action anywhere in the record in this proceeding); see also Time Warner Comments at 9 (primary reason for adopting the "fresh look" policy in the common carrier context was to make way for new entrants where no competitive alternatives previously existed; in the MDU video service context, competitive alternatives to cable existed when exclusive contracts were entered into).

[20]U S West Comments at 7.

[21]See id.

renewals are all but automatic."[22] This presumption is simply not true. A life-of-the-franchise contract has a defined end; it ends when the franchise expires. Any renewals of the franchise, and corresponding renewals of the exclusive service contract, are not guaranteed. Rather, they are subject to renegotiation by either party at the end of the franchise term.[23] Therefore, as a matter of law, life-of-the-franchise contracts are not "perpetual." For this reason, the Commission should not consider adopting OpTel's test for perpetual contracts, which proposes that "any agreement currently in effect that lacks a specific term of years [*i.e.*, one that runs for the term of the franchise and any and all renewals thereof] should be deemed to be perpetual and subject to 'fresh look.'"[24]

In sum, the Commission does not have the authority to adopt any of the proposals designed to abrogate existing exclusive service contracts. Regardless of whether a proposed rule would invalidate exclusive contracts, nullify alleged *de facto* exclusive contracts, or apply a "fresh look" approach to perpetual contracts, the Commission would be unable to overcome the plain fact that such action would constitute impermissible retroactive abrogation of privately negotiated, enforceable contractual rights.[25] Without an explicit directive from Congress allowing it to unilaterally modify such rights, such action would fall entirely

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[22]OpTel Comments at 2; see also ICTA Comments at 11-12 (contracts that run for the duration of a franchise and any renewals thereof "undoubtedly will extend in perpetuity given that it is exceedingly rare for a franchise not to be renewed").

[23]See Time Warner Comments at 5.

[24]OpTel Comments at 3; see also ICTA Comments at 12-13.

[25]See Texas & Pacific Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 437 (1907); Bell Tel. Co. of Pa. v. FCC, 503 F.2d at 1280.

outside of the Commission's jurisdiction, and would constitute an illegal and unconstitutional taking of private property without due process.[26]

B. Any regulations that do pertain to MVPD service contracts must not apply in states with mandatory access to premises statutes.

The Commission must be particularly careful to assure that any regulations that purport to apply to MVPD service contracts do not apply in states with mandatory access to premises statutes. "Mandatory access statutes basically provide customers with a choice of video programming providers," and are "the only vehicle which provide true service provider choice to customers residing in MDUs."[27] States with mandatory access statutes offer MDU residents an amount of control over their choice of MVPD service that they would not have in the absence of an access statute.[28] Whether the access statute applies to all MVPDs, or just to franchised cable operators, the

> ultimate outcome of a state mandatory access statute is the availability of choice for video programming consumers. This is especially true for tenants located in MDUs who would otherwise be forced to accept the provider chosen by their landlord.[29]

Rather than preempting mandatory access statutes, which one commenter regards as "two giant steps backward in the development of a competitive landscape and provision of real choice for MDU tenants,"[30] more states should be encouraged to enact such provisions so

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[26]See, e.g., Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441, 1446-47 (D.C. Cir. 1994) (FCC must have express statutory authority to effect a taking of private property).

[27]U S West Comments at 5-6.

[28]See id.

[29]Id. at 5.

[30]Id. at 6.

that MDU residents, like single-family home residents, can experience maximum consumer choice with regard to multichannel video programming service.[31]

Mandatory access statutes are not enacted with the goal of stifling competition, but rather, are enacted to assure that residents of MDUs will have access to multichannel video programming service, and to encourage competition in the MDU marketplace.[32] The Commission has even acknowledged that mandatory access statutes serve to facilitate competition among multiple MVPDs in MDUs:

> Contrary to [the] assertion that preemption will stifle the development of broadband communications, we believe that this decision will encourage direct competition in a specific geographic area. . . [I]t would appear that in states such as New York, where franchised cable is provided access to multi-unit dwellings by state regulatory fiat, these services may co-exist, or at least have the opportunity to compete for subscribers.[33]

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[31]See Cox Comments at 4.

[32]See, e.g., AMSAT Cable Ltd. v. Cablevision of Conn. Limited Partnership, 6 F.3d 867, 875 (2d Cir. 1993) (Connecticut cable access statute, Conn. Gen. Stat. § 16-333a, "serves the public purpose of guaranteeing that apartment residents can freely obtain access to state franchised cable service"); NYT Cable TV v. Homestead At Mansfield, Inc., 543 A.2d 10, 15 (N.J. 1988) ("mandating the right of access for cable companies results in no more than equalizing the competitive position of cable to SMATV, as the latter by its nature already has access to any customer who desires it since SMATV is itself set up in the complex or development where the customer lives"); Princeton Cablevision, Inc. v. Union Valley Corp., 478 A.2d 1234, 1239 (N.J. Super. Ch. 1983) (reason behind New Jersey's mandatory access statute "was to prevent landlords from exacting an excessive price from tenants who want to receive or from cable companies who want to provide cable services. Realistically, few landlords would have a reason flatly to prohibit access. The danger was that owners might charge unfairly for it.").

[33]Earth Satellite Communications, Inc., 95 FCC 2d 1223, ¶ 20 (1983); see also Report and Order at ¶ 37 ("the presence of multiple wires in MDUs is substantially due to the existence of state mandatory access statutes"); Further Notice of Proposed Rulemaking, CS Docket 95-184 and MM Docket 92-260, 12 FCC Rcd 13592, ¶¶ 29-30 (1997) (Commission believes that examples of two-wire competition cited by Time Warner and CableVision are largely due to existence of mandatory access statutes).

Thus, even the Commission has recognized that the purpose of mandatory access statutes is to promote competition within MDUs by assuring that cable operators are able to offer their service to MDU residents in addition to any alternative services that are also being offered. In light of this prior recognition of the importance of promoting two-wire competition, the Commission should not now be attempting to preempt state statutes that specifically allow such competition to exist.

Mandatory access statutes will result in more two-wire competition, which is the best way of ensuring that MDU residents have a choice of MVPD services.[34] Indeed, the Commission has recognized the prevalence of two-wire competition in states with access statutes, thereby proving the success of mandatory access provisions.[35] Accordingly, the Commission should be encouraging states without such provisions to enact them, rather than considering preemption of existing access statutes.

C. Any rules pertaining to MVPDs' ability to enter into exclusive contracts in the future must apply equally to all MVPDs, including cable operators.

The commenters in this proceeding generally agree that any rules the Commission adopts regarding home wiring, or the regulation of existing or future exclusive contracts should apply equally to all MVPDs.[36] The Commission should strive for parity among all

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[34]See Cox Comments at 4.

[35]See Report and Order at ¶ 37 ("the presence of multiple wires in MDUs is substantially due to the existence of state mandatory access statutes").

[36]See Community Telecommunications Association ("CATA") Comments at 4-5 (the Commission should not play the role of handicapper in the competition between cable and other MVPDs); Cox Comments at 8-10 (allowing some MVPDs, but not others, to enjoy exclusive contracts would "unfairly tilt the playing field and do little to promote the development of facilities-based competition throughout MDUs"); NCTA Comments at 5-6 (continued...)

MVPDs, because there is no legitimate basis for treating one differently from another. The Commission simply must not enact regulations that allow alternative MVPDs to enter into exclusive contracts, while prohibiting cable operators from doing the same.[37]

The Commission should not attempt to differentiate among MVPDs based on any "market power" test.[38] Determinations of "market power" are best left to agencies or courts with primary jurisdiction over such issues, and any such determination by the FCC for purposes of evaluating exclusive MDU contracts could have unintended consequences in other contexts. Moreover, the mere existence of an exclusive service contract with an MDU owner cannot be the basis for a finding of "market power."[39] If anything, franchised cable operators are at a competitive disadvantage due to the multitude of public service obligations imposed by franchising authorities and the FCC, which do not apply to unregulated MVPDs.

The Commission's proposal to "cap" the length of exclusive contracts in order to "limit the enforceability of exclusive contracts to the amount of time reasonably necessary for an MVPD to recover its specific capital costs of providing service to that MDU" also should

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[36](...continued)
("allowing some competitors but not others to enter into exclusive contracts would virtually always skew the marketplace in a way that adversely affects subscribers in the MDU"); Time Warner Comments at 12-14; U S West Comments at 7-8.

[37]Accord Cox Comments at 10; CATA Comments at 5.

[38]See Second Further Notice at ¶ 261.

[39]See Ameritech Comments at 7-8 (proposed "market power" test is inherently arbitrary, administratively impracticable, and stifles competition); Cox Comments at 8-9; RCN Comments at 5 ("market power" distinction is too cumbersome to administer); Time Warner Comments at 12-14.

not be adopted.[40] The Commission lacks authority to restrict private contracts, including adopting a "cap" on the length of exclusive service contracts, and there is no competitive benefit to the adoption of such a "cap."[41] Any "caps" on the length of exclusive service agreements should be left to arms' length negotiations between the parties, and not regulated by the Commission. It is simply not the job of the Commission to enact regulations guaranteeing the economic success of a particular MVPD by insulating it from competition long enough to recover its capital costs. Cable operators are not protected from competition in this way, and alternative MVPDs should not be so protected either.[42] Rather, the Commission's role should be to foster competition among all competing MVPDs.

II. Signal Leakage Reporting Requirements Should Apply To All MVPDs.

The Commission's signal leakage rules, including all reporting requirements, should apply to all broadband service providers that use frequencies in the aeronautical and public safety bands.[43] Once signal leakage tests are conducted, the reporting requirement is

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[40]Second Further Notice ¶ 259.

[41]See Ameritech Comments at 7 (adoption of a "cap" is "inherently arbitrary because it presumes that all MVPDs incur equivalent costs to provide service to MDUs"); CAI Comments at 2 (discourages adoption of a "cap" on length of exclusive contracts); GTE Comments at 10-13 (any attempt to "cap" the term of exclusive contracts would be inconsistent with Commission precedent, and the Commission lacks authority to do so); ICTA Comments at 9 ("longer term exclusive contracts are a prerequisite to competition, not a hindrance, and [ ] no limit on their duration is necessary"); OpTel Comments at 5 (Commission should not "intrude upon private exclusive arrangements" even to the extent of adopting a "cap" on their length); U S West Comments at 3-4 (there are no marketplace benefits to adopting a "cap" on exclusive contracts, and the Commission has no authority to implement restrictions on private contracts); Time Warner Comments at 13.

[42]See Time Warner Comments at 13-14.

[43]See id. at 15-19.

minimally burdensome, and should be completed by all MVPDs.[44] The Commission's signal leakage rules exist to assure safety of life and property, and therefore, no service providers should be exempt from reporting their test results.[45] Even if the increase in safety is minimal in comparison to the increase in cost of reporting signal leakage test results, the public interest is best served by assuring the integrity of the aeronautical and public safety frequencies.[46] The creation of a small operator exemption would not serve the public interest.

III. The Commission Should Not Mandate Shared Use Of Home Run Wiring.

Both the Commission and many of the commenters in this proceeding agree that shared use of broadband wiring by multiple MVPDs is not yet technically, practically or economically feasible, and would, therefore, be premature.[47] The reasons that shared use

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[44]NCTA Comments at 7.

[45]See Memorandum Opinion and Order re: Oxnard Cablevision (Mimeo No. 20594) (rel. August 24, 1979); Time Warner Comments at 16.

[46]Contra ICTA Comments at 16; U S West Comments at 9.

[47]See First Order on Reconsideration, MM Docket No. 92-260, 11 FCC Rcd 4561, ¶ 10 (1996) (while simultaneous use "may be possible in the laboratory, it is not technically or economically feasible in the marketplace at the present time"); see also Ameritech Comments at 12-13 (several operational and technical issues must be addressed before the Commission mandates shared use of home run wiring); CableVision Comments at 11-12 ("forced sharing of the home run wire before it is technically and practically feasible will not accomplish the Commission's goals nor will it advance the technological advances being made by cooperative testing by the parties"); NCTA Comments at 8-10 (sharing of home run wiring by multiple parties is not technically or practically feasible at this time); U S West Comments at 8 (sharing of home run wiring is neither desirable nor technically feasible at this time).

of home run is not technically or practically possible at this time are numerous.[48] Moreover, the forced sharing of home run wiring stems from the premise that a two-wire solution is not possible in most MDUs.[49] However, there has been no showing that there is "widespread reluctance on the part of MDU owners to implement a two-wire solution in their buildings."[50]

Rather than mandating the shared use of home run wiring by regulation, the Commission should leave the question whether competitors should share home run wiring to the marketplace.[51] The technical and economic considerations simply do not lend themselves to resolution by regulation.[52] Furthermore, the forced shared use of wiring would essentially create common carrier obligations and raise Fifth Amendment taking concerns that the Commission has, heretofore, tried to avoid.[53]

The argument set forth by DirecTV that sharing inside wiring is the "only realistic option available to an alternative MVPD" is not widely supported.[54] DirecTV believes that

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[48]See, e.g., Ameritech Comments at 13; CableVision Comments at 11; ICTA Comments at 17; NCTA Comments at 8-10; U S West Comments at 8-9; Time Warner Comments at 20-23.

[49]U S West Comments at 8.

[50]Id. at 8; but see DirecTV Comments at 9 (overbuilding is not practical and often not permitted because of aesthetic concerns and the inconvenience it would cause MDU residents); Further Notice of Proposed Rulemaking, CS Docket 95-184 and MM Docket 92-260, FCC 97-304, ¶¶ 25-26 (rel. August 28, 1997).

[51]ICTA Comments at 17.

[52]Id.

[53]Id.; see also Time Warner Comments at 22-23.

[54]See DirecTV Comments at 9.

the Commission should force shared use of inside wiring because "an incumbent cable operator is unlikely to agree to share inside wiring with an alternative MVPD."[55] As many commenters have explained, the reason incumbent cable operators are unlikely to agree to share inside wiring with other providers is that sharing is not technically or practically feasible.[56] The equipment needed to make possible the sharing of wiring without interference to the providers doing the sharing is simply not on the market yet.[57] DirecTV's analogy of VHF and UHF frequencies being transmitted over a single wire without difficulty is inapplicable in the MVPD context, and should not be relied upon.

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[55]Id.

[56]See *supra* n.47.

[57]see U S West Comments at 8-9.

IV. Conclusion.

For all of the reasons set forth above, and for all of the reasons set forth in Time Warner's Comments of December 23, 1997, and prior Comments and Reply Comments filed in this proceeding, the Commission should not: create rules that interfere with existing contracts; create disparity among various MVPDs with regard to the ability to enter into future exclusive contracts; exempt small MVPDs from signal leakage reporting requirements; or mandate the shared use of home run wiring.

Respectfully submitted,

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